

**RECONSTRUCTION OF STANDARD CONTRACT CLAUSE
IN SHARIA CONTRACT LAW
(A Study on Standard Contract Clause at BTN Sharia)**

THESIS

**By:
UMI CHOLIFAH
NIM 10220028**



**SHARIA BUSINESS LAW DEPARTMENT
SHARIA FACULTY
THE STATE ISLAMIC UNIVERSITY OF MAULANA MALIK IBRAHIM
MALANG
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2014**

STATEMENT OF AUNTHENTICITY

In the name of Allah swt.

With consciousness and responsibility towards the development of science, the author declares that the thesis entitled:

RECONSTRUCTION OF STANDARD CONTRACT CLAUSE IN SHARIA CONTRACT LAW (A Study on Standard Contract Clause at BTN Sharia)

is truly the author's original work. It does not incorporate any materials previously written or published by another person. If it is proven to be another person's work, duplication, or plagiarism, this thesis and my degree as the result of this action will be considered legally invalid.

Malang, 28th of March 2014

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**RECONSTRUCTION OF STANDARD CONTRACT CLAUSE
IN SHARIA CONTRACT LAW
(A Study on Standard Contract Clause at BTN Sharia)**

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I hope that this thesis is able to give the advantages to the readers and especially to me. Finally, the critics and the suggestions are really needed for the perfect of this thesis.

MOTTO

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ

وَلْيَكْتُبَ بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْبَ كَاتِبٌ أَنْ يَكْتُبَ كَمَا

عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ ...

O ye who believe! when ye Deal with Each other, In transactions involving future obligations in a fixed period of time, reduce them to writing let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah has taught him, so let Him write...¹

(QS. Al- Baqarah: 282)

¹ The English Translation of Quran Application by Yusuf Ali.

DEDICATION

“All Praises due to Allah, the Graceful, and the Sustainer”

I would like to dedicate this thesis ...

to my lovely parents, Mr. Abdul Rohman and Mrs. Lilik Sri Wahyuni for bringing
me to this world and for their continuous prayer and encouragement,

to my beloved sister Siti Maisyaroh, and brother Muhammad Nur Ikhsan for
bringing happiness to my life,

to my teachers and lecturers for their unlimited support.

Without their prayers and love, this work could not have been completed.

TRANSLITERATION GUIDANCE

Transliteration is the conversion of a text from one script to another. The conversion of scripts or writing is a procedure of replacing text written in one script or writing system with the characters of another script or system in order to make the text legible for users of another language or script. The arabic transliteration conversed to Indonesian script. It is described as follows:

ا = no sign or unwritten	ض = dl
ب = b	ط = th
ت = t	ظ = dh
ث = ts	ع = ‘(comma facing up)
ج = j	غ = gh
ح = h	ف = f
خ = kh	ق = q
د = d	ك = k
ذ = dz	ل = l
ر = r	م = m
ز = z	ن = n
س = s	و = w
ش = sy	ه = h
ص = sh	ي = y

Every arabic writings in latin vocal is written “a” in fathah, “i” in kasrah, and “u” in dlommah. These vocals in a long voice will be written as below :

A (long voice) = â example قال is written qâla

I (long voice) = î example قيل is written qîla

U (long voice) = û example دون is written dûna

Special for *ya' nisbat*. It is not allowed to be replaced with “i”. But must be written “iy” to describe the existence of *ya' nisbat* in the end. Likewise:

Diphtong (aw) = و example قول is written qawlun

Diphtong (ay) = ي example خير is written khayrun

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ABSTRACT

Umi Cholifah, 10220028, *Reconstruction of Standard Contract Clause in Sharia Contract Law (A study on Standard Contract Clause at BTN Sharia)*. Thesis, Sharia Business Law Department, Sharia Faculty, The State Islamic University (UIN) of Maulana Malik Ibrahim Malang, 1st Supervisor: Dr. M. Nur Yasin, M.Ag., 2nd Supervisor: Dr. Sudirman, M.A.

Key Words: Reconstruction, Standard Contract Clause, Sharia Contract Law

The agreement on business transactions is parallel with the standard contract clause that facilitates the contract drafter. In its development, the sharia agencies also use standard contract clause for transaction. Although standard contract clause has put the sharia elements in it, but there are some weaknesses, either in the side of philosophical, sociological, or juridical. Therefore, the ease in transaction does not become the absolute reason to ignore these weaknesses. It needs to reconstruct and makes it more similar to the sharia contract law, either in principle or theory.

The focus of this research is about the form of sharia standard contract clause which has been applied at BTN Sharia and its ideal concept in Sharia Contract Law. The purpose of this reasearch is to identify the applicable form of sharia standard contract clause either from its advantage or its disadvantage, and afterwards they are analized. The result of this analysis is used as matter to reconstruct the sharia standard contract clause at BTN Sharia, thus it becomes the ideal standard contract clause in Sharia Contract Law.

This research is normative or doctrinal research focused on what is written in the legislation. It uses statute and conceptual approach. The method of data collection is conducted by doing literature study on primary, secondary, and tertiary legal materials. The analysis method of legal materials which is used is qualitative analysis by reduction, classification, display, and interpretation. It is focused on objective methods of interpretation.

The results of this research show that standard contract clause at BTN Sharia uses the general anatomy. However, it has the advantage and the disanvantages as matter of reconstruction. Finally, from this research it can be found the ideal concept of standard contract clause at BTN in Sharia Contract Law, such as: it must be simple and easy to understand, it defines the complex terms, it must be consistent with the contract used, it must be clear and not to burden one of the parties, it does not contain contrary clause in the contract, it must be coherent and clear in its placement parts and elements of contract clause. Afterward, this reconstruction concept becomes restriction which is able to accommodate all field of positive law relevance to remove logical contradiction within it and to provide clear and simple description in standard contract clause at BTN Sharia.

ABSTRAK

Umi Cholifah, 10220028, *Rekonstruksi Klausula Kontrak Baku dalam Hukum Perjanjian Syariah (Studi Kasus pada Kontrak Baku di BTN Syariah)*. Skripsi, Jurusan Hukum Bisnis Syariah, Fakultas Syariah, Universitas Islam Negeri Maulana Malik Ibrahim Malang, Pembimbing I: Dr. M. Nur Yasin, M.Ag. Pembimbing II: Dr. Sudirman, M.A.

Kata Kunci: Rekonstruksi, Klausula Kontrak Baku, Hukum Perjanjian Syariah

Perjanjian pada transaksi bisnis sejalan dengan adanya klausula kontrak baku yang memudahkan para pihak pembuat perjanjian. Pada perkembangannya instansi-instansi syariah juga menggunakan klausula kontrak baku untuk kemudahan bertransaksi. Meskipun klausula kontrak baku tersebut telah memakai unsur syariah didalamnya, tetapi masih terdapat kelemahan baik dari segi filosofis, sosiologis, maupun yuridis. Oleh sebab itulah kemudahan dalam bertransaksi bukanlah alasan mutlak untuk mengabaikan kelemahan-kelemahan tersebut sehingga perlu dilakukan rekonstruksi agar lebih sesuai dengan Hukum Perjanjian Syariah baik dengan asas maupun teori yang terkait.

Fokus masalah dalam penelitian adalah mengenai bentuk klausula kontrak baku syariah yang sedang berlaku di BTN Sharia dan konsepnya yang ideal menurut Hukum Perjanjian Syariah. Tujuan penelitian ini untuk mengetahui bentuk dari klausula kontrak baku syariah baik dari kekurangan dan kelebihan yang kemudian dianalisis. Hasil analisis tersebut digunakan sebagai bahan untuk merekonstruksi klausula kontrak baku syariah di BTN syariah menjadi klausula kontrak baku yang ideal dalam Hukum Perjanjian Syariah.

Penelitian ini tergolong jenis penelitian hukum normatif atau penelitian doktrinal yang meneliti tentang apa yang tertulis dalam peraturan perundang-undangan. Pendekatan yang digunakan adalah pendekatan perundang-undangan dan pendekatan konseptual. Metode pengumpulan data dilakukan dengan cara studi pustaka terhadap bahan hukum primer, sekunder, maupun tersier. Metode analisis bahan hukum yang digunakan adalah analisis kualitatif dengan cara reduksi, klasifikasi, display, dan interpretasi yang difokuskan kepada metode penafsiran objektif.

Pada hasil penelitian ini ditemukan bahwa klausula kontrak baku di BTN syariah memakai anatomi kontrak pada umumnya, namun ditemukan kelebihan dan kekurangan didalamnya. Sehingga ditemukan konsep menurut Hukum Perjanjian Syariah untuk pembuatan klausula kontrak baku di BTN syariah yang ideal, yakni: kontrak harus sederhana dan mudah dipahami, terdapat pengertian pada istilah rumit, terdapat konsistensi pada akad yang dipakai, tidak ada klausula yang saling bertentangan, peletakan klausula yang runtut sesuai dengan anatomi dan element kontrak, tidak terdapat klausula yang tidak jelas dan memberatkan salah satu pihak. Pada akhirnya, konsep rekonstruksi ini menjadi batasan yang mampu mengakomodir semua bidang yang relevan dengan hukum positif, mampu

menghilangkan kontradiksi logis dan mampu memberikan gambaran yang jelas dan sederhana dalam klasula kontrak baku di BTN Syariah

ملخص البحث

أمي خليفة، 10220028، إعادة الإعمار من معيار العقد اللازم في قانون المعاهدات الشرعية (دراسة الحالة على معيار العقد اللازم في BTN الشرعي)، بحث جامعي، بقسم أحكام الاقتصاد الإسلامي، في كلية الشريعة، بالجامعة الإسلامية الحكومية (مولانا مالك إبراهيم) مالانج. المشرف الأول: الدكتور محمد نور يس، الماجستير. المشرف الثاني: الدكتور سوديرمان، الماجستير.

الكلمات الرئيسية : إعادة الإعمار، معيار العقد اللازم، قانون المعاهدات الشرعية.

اتفاق صفقة الأعمال بخط مع معيار العقد اللازم الذي يسهل على المتعاقدين. في تطويره، تستخدم الوكالات الشرعية معيار العقد اللازم للسهولة في التعامل. رغم أنهم يستعملون عناصر الشرعية فيه، و لا تزال عيوب فيه من الجهة الفلسفية والاجتماعية والقانونية. لذلك، فإن سهولة المعاملة ليست سببا مطلقا لتجاهل العيوب، فيلزم إعادة الإعمار منه لتتناسب مع خطوات قانون المعاهدات الشرعية، أساسيا كان أو نظريا.

تركيز المشكلات على هذا البحث هو تطبيق استمارة معيار العقد اللازم في BTN الشرعي ومفهوم المثالية فيه على خطوة قانون المعاهدات الشرعية. و أما الغرض من هذا البحث فهو معرفة تطبيق استمارة معيار العقد اللازم من ناحية عيوبه و مزاياه، ثم يتم إلى تحليله. إستخدام نتائج هذا التحليل لمادة إعادة الإعمار من معيار العقد اللازم ليكون معيار العقد اللازم المثالي في قانون المعاهدات الشرعية.

هذا البحث نوع من البحوث النصوصية أو المذهبية الذي تبحث عما هو مكتوب في التشريعات والقوانين. المنهج المستخدم في هذا البحث هو المنهج القوانين و المفاهيم. الطريقة في جمع البيانات المستخدمة في هذا البحث هي دراسة المكتبة على البيانات القانونية من بيانات حاجيات و ضروريات وتحسينات. الطريقة في تحليل البيانات القانونية المستخدمة هي التحليل النوع بطريقة الحفظ والتصنيف والعرض والتفسير الذي يركز على الأساليب الموضوعي في التفسير.

نتائج هذا البحث هي أن معيار العقد اللازم في BTN الشرعي يستخدم عقود التشريع بشكل عام. و بذلك، لها مزايا و عيوب، حتى يتم العثور عند مفهوم قانون المعاهدات الشرعية

لجعل معيار العقد اللازم المثالي، وهي: أولاً، أن يكون المعيار بسيطاً وسهلاً في الفهم. ثانياً، أن يوجد التعريف للمصطلحات المعقدة. ثالثاً، يلزم التناسق في العقود المستخدمة. رابعاً، عدم وجود شروط المتعارضة. خامساً، وضع الشروط مطابقاً بالتشريع و عناصر العقد. سادساً، ألا يوجد شروطاً غير واضح. و بذلك تكون إعادة الإعمار هادفة قادرة على الاستيعاب في كل مجال القانون الإيجابي، لإزالة تناقض المنطقي فيه. وأخيراً، فإنه يوفر وصفاً واضحاً وبسيطاً في معيار العقد اللازم في BTN الشرعي.